(1)

90-1185

No. _____

Supreme Court, U.S.
FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT,

Petitioner,

v.

SUSAN NELSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

JOHN J. KELLY
Chief State's Attorney
State of Connecticut

STEVEN M. SELLERS*
Assistant State's Attorney
Chief, Appellate Unit
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

JAMES A. KILLEN
Assistant State's Attorney

**Counsel of Record*

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528- '254

QUESTION PRESENTED

When a defendant has been convicted of assault on a plea of guilty and the victim subsequently dies, does the due process clause bar prosecution of the defendant for manslaughter because of an "implied promise," refuted by the record of the initial guilty plea, that no further prosecution for the incident would occur?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

A. The Decision Below Conflicts With The Decisions Of This Court And Federal Courts Acknowledging The Indispensability Of Plea Bargaining And Enforcing The Specified Terms Of A Guilty Plea 8

1. The decision below conflicts with the decisions of this Court in *United States v. Benchimol* and *Blackledge v. Allison* 8

2. The decision below conflicts with the decisions of numerous federal courts of appeal 12

B. The Decision Below Disrupts, As A Matter Of Policy, The Delicate Balance Between A Defendant's Rights And A State's Interests In Plea Bargaining, And Therefore Presents A Question Of National Significance. 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES	PAGE(S)
Baker v. United States, 781 F.2d 85 (6th Cir. 1986)	13
Blackledge v. Allison, 431 U.S. 63 (1977)	*passim*
Commonwealth v. Lesko, 501 A.2d 200 (Pa. 1985) *cert. denied*, in 479 U.S. 1101	13
Harmason v. Smith, 888 F.2d 1527 (5th Cir. 1989)	12
Henderson v. Morgan, 426 U.S. 637 (1976)	15
In re Grand Jury Proceedings, 819 F.2d 984 (11th Cir. 1987)	13
Paradiso v. United States, 689 F.2d 28 (2d Cir. 1982)	14
Parker v. Indiana, 542 N.E.2d 1026 (Ind. 1989)	13
People v. Hood, 62 N.Y.2d 863, 477 N.Y.S.2d 621, 466 N.E.2d 161 (Ct.App. 1984)	13
People v. Selikoff, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784, *cert. den.* 419 U.S. 1122	13
Santobello v. New York, 404 U.S. 257 (1971)	*passim*
Siegel v. State of New York, 691 F.2d 620 (2d Cir. 1982), *cert. denied*, in 459 U.S. 1209, *reh. denied*, in 460 U.S. 1104	13
State v. Dinndorf, 658 P.2d 372 (Mont. 1983)	13
State v. Frisard, 566 So.2d 169 (La.App.5 Cir. 1990)	13
State v. Gilnite, 202 Conn. 369, 521 A.2d 547 (1987)	10

TABLE OF AUTHORITIES – Continued

CASES **PAGE(S)**

State v. Lucero, 639 P.2d 1200 (N.M. 1981) 13

State v. Nelson, 23 Conn. App. 215, ___ A.2d ___ (1990) . . . . . *passim*

United States v. Annabi, 771 F.2d 670 (2d Cir. 1988) 12

United States v. Benchimol, 471 U.S. 453 (1985) . . . 8, 10, 11

United States v. Coleman, 895 F.2d 501 (8th Cir. 1990) 13

United States v. Doherty, 867 F.2d 47 (1st Cir. 1989) 12

United States v. Jordan, 870 F.2d 1310 (7th Cir. 1989) . . . 13

United States v. Quan, 789 F.2d 711 (9th Cir. 1986) 13

United States v. Schmitz, 887 F.2d 843 (8th Cir. 1989) . . . 13

United States v. U.S. Currency, The Amount of $228,536.00, 895 F.2d 908 (2d Cir. 1990) 12

United States v. Ykema, 887 F.2d 697 (6th Cir. 1989), *cert. denied*, in 110 S.Ct. 2565 12

United States v. Fentress, 792 F.2d 461 (4th Cir. 1986) . . . 12

United States v. Pogue, 865 F.2d 226 (10th Cir. 1989) 13

York v. State, 619 P.2d 391 (Wyo. 1980) 13

RULES OF COURT

Connecticut Practice Book § 694 . . . . . 3, 12

MISCELLANEOUS

ABA Standards for Criminal Justice, Pleas of Guilty, 14.4, 2d Ed. (1986) 14

No. _____

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT,

Petitioner,

v.

SUSAN NELSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Appellate Court, entered in this proceeding on September 11, 1990.

OPINION BELOW

The opinion of the Connecticut Appellate Court is reported at 23 Conn. App. 215, ____ A.2d ____ (1990) and is reprinted in the appendix, p. A1, *infra.* The Connecticut Supreme Court's denial of the state's petition for

tification is reported at 216 Conn. 826, ____ A.2d ____ (1990) and is reprinted in the appendix, p. A9, *infra*.

JURISDICTION

The decision of the Connecticut Appellate Court was entered on September 11, 1990. The Connecticut Supreme Court's denial of the state's petition for certification was entered on October 23, 1990. The jurisdiction of this Court to review the judgment of the Connecticut Appellate Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes § 53a-60d (Rev. to 1985):

> **Assault in the second degree with a motor vehicle: Class D felony.** (a) A person is guilty of assault in the second degree with a motor vehicle

when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes serious physical injury to another person as a consequence of the effect of such liquor or drug.

(b) Assault in the second degree with a motor vehicle is a class D felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year.

Connecticut General Statutes § 53a-56b (Rev. to 1985):

Manslaughter in the second degree with a motor vehicle: Class C felony. (a) A person is guilty of manslaughter in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as a consequence of the effect of such liquor or drug.

(b) Manslaughter in the second degree with a motor vehicle is a class C felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year.

Connecticut Practice Book § 694:

Procedure for Plea Discussions – Notice of Plea Agreement: If a plea agreement has been reached by the parties, which contemplates the entry of a plea of guilty or nolo contendere, the judicial authority shall require the disclosure of the agreement in open court or, on a showing of good cause, in camera at the time the plea is offered. Thereupon the judicial authority may accept or

reject the agreement, or he may defer his decision on acceptance or rejection until there has been an opportunity to consider the presentence report, or he may defer it for other reasons.

STATEMENT OF THE CASE

On February 20, 1988, the respondent's vehicle struck and seriously injured a 13-year-old boy in Milford, Connecticut. On April 26, 1988, the respondent entered a plea of guilty to a charge of second-degree assault with a motor vehicle while intoxicated. At the time of respondent's plea, the victim remained in the hospital with severe head and internal injuries.

Prior to her acceptance of her plea to assault, the respondent was canvassed by the trial court in accordance with Connecticut procedure. During this canvass, the following colloquy occurred:

> *The Court:* It's been indicated to the Court that there is an agreed recom[m]endation in the sentence of 5 years to the custody of the commissioner of corrections, that's 5 years in prison, suspended after 3 years with a probationary period and conditions to follow. That's what's been told to the Court. Do you understand that the Court is not bound to accept that recom[m]endation. If I feel it's not a fair sentence, I won't impose that sentence and if I do that, however, you'll be able to withdraw your guilty plea. Do you understand that?
>
> *Miss Nelson:* Yes, sir.

The Court: Other th[a]n that, once I accept your guilty plea you can't withdraw the guilty plea unless you can show some good cause to do so. Do you understand that?

Miss Nelson: Yes.

The Court: Have any other promises been made to you by anybody to cause you to plead guilty?

Miss Nelson: No, sir.

The guilty plea was accepted by the court and the respondent was sentenced in accordance with the agreement.

On October 26, 1988, the victim died as a result of the injuries he received from being struck by the respondent's vehicle. A warrant was subsequently issued for the respondent's arrest on the charge of second-degree manslaughter with a motor vehicle. The respondent moved to dismiss the manslaughter charge, arguing that (1) it was barred by principles of double jeopardy and (2) under principles of due process, the state "effectively waived its rights to prosecute" the respondent by failing to reserve them in the event that the victim died. The trial court denied the motion to dismiss, concluding that there was no double jeopardy bar and finding that the prosecutor believed at the time of the first plea that the victim "was going to make it." After withdrawing her plea to assault, the respondent entered a plea of nolo contendere to manslaughter, conditioned on her right to appeal the denial of her motion to dismiss. The respondent was then sentenced to a term of ten years imprisonment, suspended after four years, and five years probation, with credit for the time served on the earlier conviction.

On August 1, 1989, the respondent appealed to the Connecticut Appellate Court, reasserting her claim of double jeopardy and also claiming that the manslaughter prosecution violated due process because the state "induced in the [respondent] a reasonable belief that she would face no further criminal liability." On September 11, 1990, the Appellate Court reversed the manslaughter conviction and ordered the assault conviction reinstated. *State v. Nelson,* 23 Conn. App. 215, ____ A.2d ____ (1990) (appendix at A1). The Court did not address the double jeopardy issue, but found merit to the defendant's due process claim.

On October 23, 1990, the Connecticut Supreme Court denied the State of Connecticut's petition for certification to appeal the Appellate Court judgment. *State v. Nelson,* 216 Conn. 826, ____ A.2d ____ (1990) (appendix at A9).

REASONS FOR GRANTING THE PETITION

The Connecticut Appellate Court has held that the Due Process Clause recognizes and enforces an implicit promise not to further prosecute if the state fails to warn a defendant, prior to her guilty plea for assault, that she may face additional prosecution if the victim dies. The court held that the principles of fairness inherent in the Due Process Clause require this result even though the defendant misrepresented on the record at the time of her plea that no further, unrecorded promises had induced her plea. The state court's holding directly conflicts with the decisions of this Court and the federal courts of appeal reaffirming the solemnity of a guilty plea and imposes upon judges and prosecutors additional obligations which undermine the "presuppos[ition of] fairness in securing agreement between an accused and a prosecutor." *Santobello v. New York*, 404 U.S. 257, 261 (1971).

If the analysis of the court below is accepted by courts generally, there will be an inescapable diminution in the solemnity of guilty pleas in American courts. Indeed, defendants will need only to contest their guilty pleas, with the benefit of hindsight, upon ephemeral notions of what was "implied" in their plea agreement. Prosecutors, and judges too, will be less likely to engage in plea bargaining for fear that they must account for every conceivable implied consequence of the agreement, regardless of how specific and thorough the plea canvass might be.

A. The Decision Below Conflicts With The Decisions Of This Court And Federal Courts Acknowledging The Indispensability Of Plea Bargaining And Enforcing The Specified Terms Of A Guilty Plea.

1. The decision below conflicts with the decisions of this Court in *United States v. Benchimol* and *Blackledge v. Allison.*

This case reaches far beyond the vagaries of Connecticut procedure or, for that matter, the specific facts of this case. Even assuming that the factual findings of the Connecticut Appellate Court are correct,[1] the fact remains that the state appellate court has, under a conveniently broad expansion of due process protections, imported an "implied promise" component to plea agreements in Connecticut. If this approach were to proliferate, the facts of this or any case would have little bearing on the important question of law and policy posed: Does the Due Process Clause require subsequent enforcement of additional, unrecorded terms to a plea agreement when a defendant had represented at the time of the plea that no additional, unrecorded promises were made to induce the plea? The cases of this and other courts refute the notion that it does.

Relying upon this Court's decision in *Santobello,* 404 U.S. at 260-61, the Connecticut Appellate Court concluded that the right of due process provided by the federal constitution required dismissal of the manslaughter charges because the prosecution failed to warn the

---

[1] *See* footnote 2, *infra.*

respondent at the time of her plea to assault that she could face a manslaughter prosecution if the victim subsequently died. *State v. Nelson,* 23 Conn. App. at 218–219 (appendix at A4–A6). The court gave no weight to the undisputed fact that, at the time of her plea to assault, the respondent represented to the court that no promises were made to induce her plea other than the promise of a three-year sentence for that charge. The court concluded that, notwithstanding this solemn representation by the respondent, due process imposed upon the prosecution the obligation to enunciate what "was not covered by the agreement" and to "reserv[e] a right to prosecute in the event of the victim's death" or else forego such a right. *State v. Nelson,* 23 Conn. App. at 219 (appendix at A6). Because the prosecution failed to make such a reservation in this case, the court concluded that implicit in the agreement was a promise by the state barring any further prosecution in the event of the victim's death and that the Due Process Clause requires enforcement of that implicit agreement.[2]

---

[2] To support its conclusion that a promise barring further prosecution in the event of the victim's death was implicit in this case, the court reasoned that it would have been illogical for the respondent to have agreed to a three-year term of imprisonment in the absence of such a promise. It also noted that the state's destruction of "certain evidence" after the respondent was sentenced for assault supported a reasonable belief that there would be no further criminal liability.

Connecticut consistently has contended that the Connecticut Appellate Court, contrary to state procedure, improperly engaged in factfinding to contradict and supplement the facts found by the trial court regarding what the parties actually

(Continued on following page)

By interpreting the Due Process Clause to require enforcement of implicit, unrecorded terms to a plea agreement, the state court's holding conflicts with this Court's decisions in *United States v. Benchimol,* 471 U.S. 453, 456 (1985) and *Blackledge v. Allison,* 431 U.S. 63 (1977).

In *Benchimol,* the Ninth Circuit Court of Appeals had concluded that the government failed to comply with its part of the plea bargain because, although it recommended a lenient sentence in accordance with the explicit provisions of the agreement, the government made the recommendation with "less-than-enthusiastic support." *Benchimol,* 471 U.S. at 455, citing 738 F.2d 1001, 1002 (CA9 1984). The Ninth Circuit held that "when the government undertakes to recommend a sentence pursuant to a plea bargain, it has the duty to state its recommendation clearly to the sentencing judge and to express the justification for it." 738 F.2d at 1002. This Court subsequently reversed the Ninth Circuit, holding that "it was error for the Court of Appeals to imply as a matter of law a term which the parties themselves did not agree upon." *Benchimol,* 471 U.S. at 456.[3] Here, the Connecticut Appellate

---

(Continued from previous page)

believed. *See State v. Gilnite,* 202 Conn. 369, 379, 521 A.2d 547 (1987) (not for an appellate court to speculate whether a plea was conditioned upon terms not appearing in record). For purposes of this petition, however, the state assumes that the facts cited by the Connecticut Appellate Court are controlling.

[3] Although *Benchimol* involved consideration of Federal Rule 11(e), which controls federal plea bargains generally, it is axiomatic that the Court's interpretation of that Rule must comport

(Continued on following page)

Court did exactly what the Ninth Circuit did in *Benchimol* – it placed upon the government the "duty" to reserve any rights not expressly stated in the agreement and "impl[ied] as a matter of law" a forfeiture of all prosecutorial rights not expressly reserved by the government.

In *Blackledge,* this Court affirmed a Court of Appeal's ruling that a habeas corpus petition which alleged that a guilty plea was induced by an unkept promise should not have been summarily dismissed without an evidentiary hearing. *Blackledge,* 431 U.S. at 75–76. The Court noted that, at the time of the taking of the plea, the North Carolina guilty plea procedure had not been modified in light of *Santobello;* that no transcript of the proceeding had been made; that the record was "silent as to what statements [the defendant], his lawyer, or the prosecutor might have made regarding promised sentencing concessions;" and that the pre-*Santobello* "atmosphere of secrecy which then characterized plea bargaining generally" excused the defendant's failure to state the terms of the alleged plea bargain earlier. *Blackledge,* 431 U.S. at 76–77. The Court stressed, however, that had formal procedures regarding acceptance of guilty pleas been adopted and followed, the

---

(Continued from previous page)

with due process strictures. The Court could not have concluded that Rule 11(e) imposes no additional, "implied-in-law" terms to a plea agreement if such a conclusion would have conflicted with due process protections.

> petition would have been cast in a very different light. The careful explication of the legitimacy of plea bargaining, the questioning of both lawyers, and the verbatim record of their answers at the guilty-plea proceedings would almost surely have shown whether any bargain did exist and, if so, insured that it was not ignored.

Blackledge, 431 U.S. at 79–80. *See also, id.,* 431 U.S. at 84 (Powell, J., concurring).

This case presents the precise scenario envisioned by *Blackledge.* Through its rules of court, Connecticut courts have mandated that plea agreements be disclosed in open court. *See* Connecticut Practice Book § 694. Yet, despite the state's strict adherence to that mandate, the court below has seen fit to honor only in the breach this Court's admonition in *Blackledge.*

2. The decision below conflicts with the decisions of numerous federal courts of appeal.

The Connecticut Appellate Court's "implied promise" theory of plea bargaining also is contrary to the view of every federal circuit which has addressed such claims. Indeed, each of these courts has emphasized the importance of the literal, on-the-record terms of plea agreements, thus rejecting the view that "implied promises" may be used to impeach such agreements. *See United States v. Doherty,* 867 F.2d 47, 72 (1st Cir. 1989); *United States v. U.S. Currency, The Amount of $228,536.00,* 895 F.2d 908, 914 (2d Cir. 1990); *United States v. Annabi,* 771 F.2d 670, 672 (2d Cir. 1988); *United States v. Fentress,* 792 F.2d 461, 464 (4th Cir. 1986); *Harmason v. Smith,* 888 F.2d 1527 (5th Cir. 1989); *United States v. Ykema,* 887 F.2d 697 (6th Cir.

1989), *cert. denied,* in 110 S.Ct. 2565; *Baker v. United States,* 781 F.2d 85, 90 (6th Cir. 1986); *United States v. Jordan,* 870 F.2d 1310, 1316 (7th Cir. 1989); *United States v. Coleman,* 895 F.2d 501, 506 (8th Cir. 1990); *United States v. Schmitz,* 887 F.2d 843 (8th Cir. 1989); *United States v. Quan,* 789 F.2d 711, 714 (9th Cir. 1986); *United States v. Pogue,* 865 F.2d 226 (10th Cir. 1989); *In re Grand Jury Proceedings,* 819 F.2d 984, 986-87 (11th Cir. 1987).[4]

In fact, the court below arguably has brought itself into conflict, as a matter of federal law, with the Second Circuit, which has held that due process is not violated by a New York state policy which bars enforcement of any promises not contained in the record of the plea proceeding. *Siegel v. State of New York,* 691 F.2d 620 (2d Cir. 1982), *cert. denied,* in 459 U.S. 1209, *reh. denied,* in 460 U.S. 1104. If due process does not demand enforcement of off-the-record plea agreements, no matter how explicit,

---

[4] There appears to be a split of authority among state courts regarding enforcement of unrecorded terms to plea agreements. *See People v. Hood,* 62 N.Y.2d 863, 477 N.Y.S.2d 621, 622, 466 N.E.2d 161 (Ct.App. 1984) and *People v. Selikoff,* 35 N.Y.2d 227, 244, 360 N.Y.S.2d 623, 318 N.E.2d 784, *cert. den.* 419 U.S. 1122 (absolute bar on enforcement of unrecorded terms); *State v. Lucero,* 639 P.2d 1200, 1204 (N.M. 1981) *(id.); York v. State,* 619 P.2d 391, 394 (Wyo. 1980) (emphasizing absence of alleged additional terms in recorded plea agreement); *Commonwealth v. Lesko,* 501 A.2d 200, 209-10 (Pa. 1985), *cert. denied,* in 479 U.S. 1101 *(id.); Parker v. Indiana,* 542 N.E.2d 1026, 1029 (Ind. 1989) *(id.); State v. Frisard,* 566 So.2d 169 (La.App.5 Cir. 1990) (enforcing implied promise by state not to file multiple bill notwithstanding absence of such promise from recorded agreement); *State v. Dinndorf,* 658 P.2d 372 (Mont. 1983) (noting disagreement with New York state policy of refusal to enforce unrecorded agreements).

then it clearly does not require enforcement of off-the-record, implicit ones.[5]

B. The Decision Below Disrupts, As A Matter Of Policy, The Delicate Balance Between A Defendant's Rights And A State's Interests In Plea Bargaining, And Therefore Presents A Question Of National Significance.

Guilty pleas account for at least 90% of all criminal convictions in the United States. ABA Standards for Criminal Justice, Pleas of Guilty, 14.4, 2d Ed. (1986). As the state court recognized, at least nominally, "without this vital process, the overburdened wheels of justice would nearly grind to a stop." 22 Conn. App. at 218 (appendix at A4). As this Court stated in *Santobello,* 404 U.S. at 261, considerations which make plea bargaining an "essential" and "highly desirable" part of the criminal process "presuppose fairness in securing agreement between an accused and a prosecutor." Yet, the Connecticut Appellate Court concluded here that fairness also imposes the burden on the prosecution to specify what is *not* covered by an agreement, notwithstanding respondent's explicit concession, on the record, that the agreement included no terms other than the sentencing recommendation. "Solemn declarations in open court

---

[5] The Connecticut Appellate Court's reliance on the Second Circuit decision in *Paradiso v. United States,* 689 F.2d 28 (2d Cir. 1982) is misplaced. *Paradiso* involved the question of whether a defendant reasonably interpreted an express, but ambiguous, provision of a plea agreement. *Paradiso* does not stand for the proposition that, where there is *no* provision for a future contingency, a defendant's "reasonable belief" may create one.

carry a strong presumption of verity." *Blackledge v. Allison,* 431 U.S. 63 (1977). The integrity of guilty plea proceedings will be severely undermined if defendants are entitled to impeach so cavalierly their "solemn" representations in order to obtain the windfall of further, implicit promises not expressly disavowed by the prosecution.

Moreover, prosecutors and judges alike, constrained to operate under this definition of "fairness," will be forced to conceive of every potential implication of a plea agreement, lest they run the risk of the result evident here. One wonders whether, under such risks, plea agreements would remain a valid alternative in the criminal justice system.

Finally, the decision below is significant for what it does not say. *Santobello* reaffirmed the right of the accused to be counseled prior to entering a guilty plea, a right fully afforded the respondent here. *Santobello,* 404 U.S. at 261. Inexplicably, the court below attached no significance to the presence of defense counsel and placed absolutely no obligation on counsel to correct his client's misrepresentation to the trial court as to the existence of further promises. Surely the presence of counsel had greater significance. *See Henderson v. Morgan,* 426 U.S. 637, 647 (1976).

CONCLUSION

The Connecticut Appellate Court has held that, absent enforcement of an additional, unrecorded "implied promise" underlying the respondent's guilty plea, the respondent's due process rights would have been violated in this case. By creating and enforcing an "implied promise" by the state not to further prosecute the respondent in the event of the victim's death, the court below has achieved an unprecedented expansion of due process protections and has brought itself into conflict with the decisions of this Court, the federal courts of appeal and numerous state courts of last resort. If allowed to proliferate, the reasoning of the state court threatens the solemnity and finality of guilty pleas, which have become an essential component of our criminal justice system.

Respectfully submitted,

THE STATE OF CONNECTICUT

JOHN J. KELLY
Chief State's Attorney

Counsel of Record:

STEVEN M. SELLERS
Assistant State's Attorney
Chief, Appellate Unit
Office of the Chief State's Attorney

Of Counsel:

JAMES A. KILLEN
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney

January, 1991

No. _____

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT,

Petitioner,

v.

SUSAN NELSON,

Respondent.

APPENDIX

APPENDIX TABLE OF CONTENTS

PAGE

OPINION OF CONNECTICUT APPELLATE COURT A1

DENIAL OF CERTIFICATION TO CONNECTICUT SUPREME COURT A9

STATE OF CONNECTICUT *v.* SUSAN NELSON
(8297)

O'CONNELL, LAVERY and CRETELLA, Js.

Convicted, on a conditional plea of nolo contendere, of the crime of manslaughter in the second degree with a motor vehicle, the defendant appealed to this court. She claimed, inter alia, that the manslaughter prosecution violated an earlier plea agreement involving the charge of assault in the second degree with a motor vehicle arising out of the same incident. *Held* that the trial court should have granted the defendant's motion to dismiss the manslaughter charge; the agreement under which the defendant pleaded guilty to assault barred her reprosecution on manslaughter charges because, in bargaining for the plea, the state induced in her a reasonable belief that no further charges would be brought if the victim died.

Argued June 18 – decision released September 11, 1990

Information charging the defendant with the crime of manslaughter in the second degree with a motor vehicle, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number five, and presented to the court, *Reilly, J.*, on a plea of nolo contendere; judgment of guilty, from which the defendant appealed to this court. *Reversed; judgment directed.*

Gary Case, certified legal intern, with whom were *Timothy H. Everett* and *Pamela A. Mitchell,* certified legal intern, and, on the brief, *Michael R. Sheldon,* for the appellant (defendant).

James A. Killen, assistant state's attorney, with whom, on the brief, were *Mary Galvin,* state's attorney, and *Paul Gaetano,* deputy assistant state's attorney, for the appellee (state).

O'CONNELL, J. This appeal arises after the defendant's conditional plea of nolo contendere to a charge of manslaughter in the second degree with a motor vehicle in violation of General Statutes § 53a-56b. She argues that this manslaughter prosecution (1) violated an earlier plea agreement involving a lesser charge arising out the same incident, and (2) violated the constitutional prohibition against double jeopardy. We reverse.

The following facts are relevant to this appeal. On February 20, 1988, the defendant was driving southbound on Surf Avenue in Milford when she lost control of her vehicle. Her car crossed the northbound lane, mounted the curb and struck a thirteen year old victim, who had been unable to escape the path of the oncoming car. The victim suffered severe head and internal injuries. The defendant failed a field sobriety test and two subsequent breath tests, which showed a blood alcohol level of .163 and .141. She was subsequently charged, inter alia, with assault in the second degree with a motor vehicle in violation of General Statutes § 53a-60d.

On April 26, 1988, defense counsel, the state's attorney and Bernard F. Joy, the attorney who represented the victim and his family, met in a pretrial conference with the trial judge in his chambers to discuss a plea agreement. At that conference, Joy informed all present that the victim was still hospitalized in grave condition and that he might not live. At the conclusion of the conference, the trial judge indicated that he would accept the plea. The defendant then pleaded guilty to the assault charge pursuant to the agreement.

The defendant's sentencing took place on June 10, 1988. At the hearing, the victim's mother described the condition of her hospitalized son. She informed the court, *Gill, J.*, that the victim's condition was still extremely serious and that he faced a long and difficult recovery period. The court then sentenced the defendant to the agreed upon term of five years in the custody of the commissioner of correction, suspended after three years, and five years probation. At the conclusion of its sentencing remarks, the court granted the state's request that property seized from the defendant be destroyed. General Statutes § 54-36a.

The victim died from his injuries on October 26, 1988, never having left the hospital. On February 21, 1989, a warrant was issued for the defendant's arrest on the charge of manslaughter in the second degree with a motor vehicle. The defendant moved to dismiss the information on the grounds that the new prosecution was barred by principles of double jeopardy and that the state had waived any rights to bring additional charges when it agreed to the April, 1988 plea bargain.

At the hearing on the defendant's motion, the court, *Reilly, J.*, found that, prior to the defendant's guilty plea, Joy had informed all concerned of the victim's precarious condition. The court also found, however, that other information, including hospital records, indicated that the victim had been recovering. The court concluded that it would not hold the state to predicting the victim's death, and it denied the motion to dismiss.

The court then indicated that it would allow the defendant to withdraw her earlier guilty plea, and the defen-

dant did so on June 22, 1989. This was followed by the defendant's plea of nolo contendere to the manslaughter charge, conditioned on her right to appeal the denial of her motion to dismiss. General Statutes § 54-94a; Practice Book § 4003. She was sentenced to a term of ten years imprisonment, suspended after four years, and five years probation, with credit for time served on the earlier conviction. This appeal followed.

In her first claim, the defendant argues that the agreement under which she pleaded guilty to assault barred her reprosecution on a manslaughter charge because, in bargaining for the plea, the state induced in her a reasonable belief that no further charges would be brought if the victim were to die. She argues that the second prosecution thus violated her due process guarantees. The state counters that it abided by the terms of the agreement and that no mention was made of the chance of further prosecution. Any misunderstanding by the defendant, the state asserts, cannot be attributed to anything the state did or did not say or do.

Plea agreements are an essential and necessary part of the administration of justice; *Santobello v. New York*, 404 U.S. 257, 260-61, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); and, without this vital process, the overburdened wheels of justice would nearly grind to a stop. "Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects

the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." Id., 261. This essential tool of the criminal justice system will lose its efficacy if the state's performance of the agreement is contrary to the reasonable expectations of the defendant. *State v. Lopez,* 197 Conn. 337, 341, 497 A.2d 390 (1985); *State v. Thomas,* 61 N.J. 314, 321, 294 A.2d 57 (1972). "Because a defendant waives several constitutional rights when [she] elects to plead guilty to a criminal offense, the choice of a guilty plea is of profound significance." *State v. Lopez,* supra.

If the state makes promises to the defendant in order to induce a guilty plea, those promises must be fulfilled; *Santobello v. New York,* supra, 262; and " '[t]he breaking of a promise made by the prosecutor as a result of plea negotiations is sufficient to invalidate a conviction.' " *Szarwak v. Warden,* 167 Conn. 10, 19, 355 A.2d 49 (1974); see also *Paradiso v. United States,* 689 F.2d 28, 30 (2d Cir. 1982), cert. denied, 459 U.S. 1116, 103 S. Ct. 752, 74 L. Ed. 2d 970 (1983).

Where, as here, there is a dispute as to the terms of a plea agreement, our analysis turns on "the real intent of the parties, and most significantly, of [the defendant]. . . ." *Paradiso v. United States,* supra, 31. The defendant argues that she reasonably believed that the plea agreement terminated all her criminal liability flowing from the accident. Despite the state's silence as to what would happen if the victim died, its conduct strongly

implied that it shared the defendant's interpretation of the plea agreement.

The trial court found that the parties were aware of the victim's precarious condition. While it is true that at the sentencing hearing the victim's mother spoke of his eventual recovery, the state and the defendant had to be aware that this was by no means a certainty. Under the circumstances, it was incumbent upon the state to ennunciate what was and was not covered by the agreement lest the defendant be allowed to go to plea under the impression that the criminal portion of this tragic episode was closed. If the state was reserving a right to reprosecute in the event of the victim's death, it could have, and should have, said so. It did not even remotely imply that this was its intent.

We take particular note of the fact that, at the conclusion of the June, 1988 sentencing, the state moved to have certain evidence in the case destroyed. At oral argument, the state suggested that this evidence related to two additional criminal charges that were nolled as part of the plea agreement. We need not accept the state's invitation to go outside the record and confirm this fact. The destruction of any evidence seized at a crime scene is consistent with a belief that no further charges will be brought and lends credence to the defendant's claim that she reasonably believed her plea ended her criminal liability.

Furthermore, we think it significant that the parties agreed to a specific term of imprisonment. We question whether the defendant would have given her assent to a prison term if she thought that additional, more serious charges could be brought later. See *State v. Schaeffer*, 5

Conn. App. 378, 390, 498 A.2d 134 (1985) (term of imprisonment is the defendant's "bottom line"). It is a basic principle of law that common sense is not left at the courtroom door. See *State v. Zayas,* 195 Conn. 611, 620, 490 A.2d 68 (1985). It would be illogical to conclude that the defendant would have agreed to a three year term of imprisonment if she believed that it was perhaps only the first installment on a lengthier term to be imposed if Eric died.

The state also contends that even if we find that the plea agreement was breached, the breach was harmless because the defendant was allowed to withdraw her plea on the assault charge. We disagree. It is true that "fairness ordinarily impels the court, in its discretion, either to accord specific performance of the agreement or to permit the opportunity to withdraw the guilty plea." *State v. Littlejohn,* 199 Conn. 631, 644, 508 A.2d 1376 (1986). If the plea is withdrawn, however, that means that the defendant will plead anew to the original charges. *Santobello v. New York,* supra, 263 n.2. Under the facts of this case, we conclude that it would be unjust to the defendant for us to vacate her plea when she "has already been punished for the crime to which [she] confessed." *State v. Thomas,* supra, 324. Accordingly, we hold that specific performance of the agreement is the only appropriate remedy because it is the only way that the status quo can be restored. Id.

In view of our disposition of the first claim, we do not reach the double jeopardy issue.

The judgment of conviction of manslaughter in the second degree with a motor vehicle is reversed and the

case is remanded with direction to reinstate the defendant's conviction of assault in the second degree with a motor vehicle.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SUSAN NELSON

The state of Connecticut's petition for certification for appeal from the Appellate Court, 23 Conn. App. 215, is denied.

James A. Killen, assistant state's attorney, in support of the petition.

Timothy H. Everett and *Gary M. Case,* certified legal intern, in opposition.

Decided October 23, 1990